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# *What Every Business Should Know About Federal Investigations*

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## Introduction

The federal government is investigating its citizens—individuals, organizations and companies—on a continuous basis throughout the United States and abroad. What unexpected risks could an ordinary person or business face when interacting with the federal government, and how can these risks be reduced or mitigated? The short answer is that government investigators can cause untold harm to individuals and businesses who are unaware of their methods, tools, and proclivities. It is a hazardous arena and should not be traversed without the assistance of competent and experienced legal counsel.

## Investigations All Around

The vast majority of federal investigations are spearheaded by one of the 93 United States Attorney's Offices located across the country, although some investigations are initiated and run from Washington, D.C. The United States Attorneys are appointed by the President and subject to confirmation by the Senate. Based upon federal judicial districts, some states have one United States Attorney, and others like New York and California have as many as four. Michigan has two judicial districts—the Eastern District (headquartered in Detroit) and the Western District (headquartered in Grand Rapids). While presidential appointees are in charge of the offices during their term, the investigations and cases are handled by non-political career Assistant United States Attorneys.

For the most part, federal investigations are invisible to the public unless and until they bear fruit. Many investigations are begun and later closed for lack of sufficient admissible evidence, the age of the relevant offense, competing priorities, cooperation of investigative targets, or other reasons. Investigations are initiated because some type of information suggesting that a crime has been committed comes to the attention of government agents and prosecutors. The offense must be cognizable somewhere within the multiple thousands of pages of the United States Code and some portion of the conduct at issue must have been committed within the judicial district investigating the matter.

If an individual, organization, or company first learns of a federal investigation when their name appears on a federal indictment, the newly-minted defendant is at a serious disadvantage. At that point, the defendant has missed opportunities to cooperate with the government, to have a sense of what liabilities it might face, to attempt to persuade the government not to charge at all or to bring less serious charges, to negotiate a pre-indictment resolution of the matter, and to manage the personal and business fallout from a criminal charge. Even where someone close to the organization is charged rather than the company itself (such as an employee, officer, or relative), the close association to a federal indictment can be quite damaging. A lack of understanding regarding how federal investigations proceed can also result in someone inadvertently committing a process crime such as making false or misleading statements, witness tampering, destruction of evidence, or obstruction of justice. A good percentage of federal investigations fail to achieve their initial charging goal but nevertheless result in federal charges against persons or entities who get in the way.

## How Innocent People and Companies Get In Trouble

When dealing with the government, it is important to remember that the playing field is not fair or equal. The power and resource differential is enormous. Government officials represent the sovereign, are able to impose their will by force, and do not play by the same rules that apply to the public. Federal agents (as distinguished from prosecutors) are permitted to trick and deceive criminal suspects in order to elicit incriminating information.[1] However, lying to a federal agent or prosecutor, concealing a material fact from them, or using a false written statement in dealing with such officials is a five-year felony under 18 USC 1001. This statute snags many a defendant who would

not otherwise be charged with a crime. The noncustodial interviews, from which such charges normally spring, are usually not recorded and are always witnessed by at least two agents. Accordingly, when there is a dispute as to what was said, it will be two professional federal agents against an untrained citizen. A truthful person can easily be prosecuted for violating section 1001 based upon a faulty memory, an agent's misunderstanding, an educational disparity, or even a cultural difference in the use of language. It is important to level this playing field by seeking legal representation before interacting with the government, especially in an unrecorded setting.

An easy way to run afoul of the law occurs when advice is given to a friend, relative, colleague, or employee by a non-attorney. Upon hearing from such an associate that "the FBI would like to speak with me," an answer of "you don't have to meet with them" could be viewed as witness tampering, a 20-year felony, under 18 USC 1512. The simplest way to charge a violation of section 1512 is to allege that someone "attempted to corruptly persuade or mislead" a potential federal witness "with intent to hinder or delay" their communication of information to a law enforcement officer relating to the "possible commission of a federal offense." Again, someone may be charged with hindering an investigation, even when there was no actual underlying crime and even though the investigation was not actually hindered. An attorney who advises a client not to speak to authorities, on the other hand, is merely providing competent advice of constitutional rights.

One rather squishy statute casting a broad net of prosecutorial discretion is the "omnibus clause" of 18 USC 1503. This prohibits corruptly "endeavor[ing] to influence, obstruct, or impede, the due administration of justice." A ten-year felony in the most innocuous circumstances, section 1503 has been interpreted as requiring pending judicial proceedings but does not specify the type of conduct made unlawful.[2] A similar catch-all provision makes it a crime to corruptly endeavor to influence, obstruct, or impede "the due and proper administration of the law" before any federal department or agency. 18 USC 1505. Again, the precise conduct needed to violate this law is left to the discretion of federal agents and prosecutors.

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## Federal Grand Jury Investigations

The ubiquity of federal investigations is mostly known to banks, internet service providers, telecommunications companies, and credit card companies who receive federal grand jury subpoenas *duces tecum* frequently. Federal grand juries are composed of 23 citizens who serve for up to 18 months and meet in secret to consider evidence of federal crimes. Every person or entity charged with a federal crime must be indicted by the vote of at least 12 members of the grand jury,[3] unless the accused waives grand jury indictment pursuant to an agreement with the government. With limited exceptions, the existence of a grand jury investigation may not be disclosed by prosecutors, agents, grand jurors, court reporters, or interpreters.[4] Public officials and grand jurors have been prosecuted in the past for violating grand jury secrecy, usually for obstruction of justice in violation of 18 USC 1503 or criminal contempt in violation of 18 USC 401(3).[5]

Huge amounts of detailed personal information are gathered, processed by corporate compliance departments, and provided to the government in response to grand jury subpoenas. The organizations frequently waive their appearance before the grand jury and provide the information through an evidence custodian to a federal agent, and thus never see the grand jury. A subpoena is issued by an Assistant U.S. Attorney upon request by a federal investigator, resulting in an investigative file being opened. Many of these files go nowhere and are ultimately closed without any judicial proceeding. A federal grand jury sitting in Michigan may issue subpoenas nationwide. In practice, federal agents and U.S. Attorneys issue subpoenas under the auspices of the grand jury for evidence to any person or organization within the United States without judicial approval or specific permission of the grand jury. The subpoenas may be issued without probable cause or reasonable suspicion or any requisite facts that a crime has been committed;[6] they "may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates."[7]

While broad investigative power is invested in the grand jury (i.e., the U.S. Attorney), it is not unlimited. "Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass."[8] Nor may grand jury investigations "violate

a valid privilege, whether established by the Constitution, statutes, or the common law."[9] An individual's Fifth Amendment right not to testify before the grand jury "grounded on a reasonable fear of prosecution"[10] will be sustained unless the witness waives that right or is granted immunity.[11] Once a waiver or grant of immunity occurs, the subpoenaed grand jury witness is subject to imprisonment for civil contempt until the witness complies by providing testimony, pursuant to 28 USC 1826(a) (the Recalcitrant Witness Statute).[12]

Corporations, partnerships, and other business entities have no Fifth Amendment privilege, no matter how small the organization may be.[13] Custodians of subpoenaed business records, though they are individuals, cannot claim a Fifth Amendment privilege to avoid production because they hold corporate records "in a representative rather than a personal capacity."[14] Accordingly, a custodian's production of records is an act of the business, not a personal act. Any claim of Fifth Amendment privilege "would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege."[15] The government may use the subpoenaed records against the individual custodian, should they prove incriminating, but may not use the act of production against the custodian because "the act is deemed one of the corporation and not the individual."[16] Even entities owned by a foreign country, or foreign countries themselves, are subject to monetary sanctions for failure to comply with a grand jury subpoena based upon federal courts' inherent contempt power.[17] Instead, businesses would need to rely upon another recognized privilege,[18] or establish that "compliance would be unreasonable or oppressive"[19] to quash a grand jury subpoena.

Upon receipt of a grand jury subpoena for information, another question fraught with peril is whether the company will tell its customers or clients of such service. Some businesses do not provide notice to customers as a matter of corporate policy. Other entities such as financial institutions may not advise persons named in a grand jury subpoena because of judicial[20] or statutory[21] prohibitions, which could imperil their status as an insured depository institution and monetary penalties. Additionally, officers, directors, employees and attorneys for financial institutions risk prosecution for obstruction of justice for disclosing the existence of grand jury subpoenas for records. This can be a five-year felony[22] or a one-year misdemeanor[23] depending upon the level of intent. Insurance companies and their officers, directors and employees have similar risks if they reveal the existence of grand jury subpoenas to persons whose records are subpoenaed.[24] When dealing with telecommunications companies and internet service providers, the government may prevent or delay their disclosure of grand jury subpoenas by seeking an order for delayed notice reciting obstruction of justice concerns.[25] With this myriad of intersecting laws supporting grand jury secrecy, it is not surprising that federal grand jury investigations proceed in large part out of public view.

## Search Warrants

Other than being named as a defendant in a federal indictment, the last thing a business of any type would like to see is a federal agent (or more likely a team of federal agents) on its doorstep at 8:00 a.m. with a warrant authorizing the search of the premises including all computers and communications devices. Unlike with a subpoena, where there is an avenue to request modification or relief from the court, nothing will stop the full execution of a search warrant once it has begun. Search warrants are issued by federal magistrate judges upon a showing of probable cause that (1) a crime has been committed and (2) evidence of that crime will be found within a location or device. Notwithstanding the terminology, probable cause does not mean "probably" or "more probable than not," as in a preponderance of the evidence standard.[26] Instead, the question is whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[27] Warrants, once issued, will be upheld "as long as there is a 'substantial basis' for a 'fair probability' that evidence will be found."[28] Such an imprecise formulation demonstrates the ease with which a search warrant can be obtained.[29]

Search warrants and the affidavits supporting them are typically sealed so that they can be executed before anyone can destroy, alter, or remove evidence. A common time for search warrant execution is first thing in the morning to maximize shock value, surprise, and daylight hours—in the event the search takes a while. During one search of a business in the Detroit area, agents employed a helicopter, what some observers

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might think is a tank, and a large team of agents wearing helmets and flack vests. The psychological impact of a search warrant execution can result in employee resignations, loss of business, and panicked attempts to conceal or destroy evidence. It is common for statements to be made to the police during the execution of search warrants that are later used in evidence. No *Miranda* warnings are likely to be given for such non-custodial interactions.

The probable cause supporting the issuance of the search warrant will not be provided to the company being searched at the time of execution. Only the search warrant itself will be served on the occupant of the premises—describing the place to be searched and the items to be seized. Unless a criminal charge is ultimately brought, an individual or organization may never learn the probable cause behind the issuance of the search warrant because it is likely to remain sealed indefinitely.

A top to bottom search at one's offices can cause untold harm even if no criminal charge is ultimately brought, and the government pays no penalty for a search warrant that comes up empty.

It is very possible that every electronic device, laptop, and computer hard drive on the premises of a company could be seized by agents armed with a search warrant, unless imaging or copying of these devices is possible at the scene. Many of these computing devices could contain highly personal, irrelevant, and even privileged information. The government will be responsible for assigning walled-off taint teams to prevent privileged material from being reviewed by agents and prosecutors directly involved in any future prosecution. The fact that the government is required to act responsibly and lawfully with respect to one's personal and privileged information is of little comfort to most people. Not surprisingly, many individuals and businesses are anxious to come to the negotiating table after their organization has been the subject of a search warrant execution.

Obtaining warrants to seize and search all records and computing devices located within a business is not all that difficult. It certainly is not hard to believe that a single disgruntled employee could cause such a warrant to be issued. A top to bottom search at one's offices can cause untold harm even if no criminal charge is ultimately brought, and the government pays no penalty for a search warrant that comes up empty.

## Preventing and Detecting Criminal Conduct Through Due Diligence, Internal Investigation, and Timely Cooperation Can Mitigate Corporate Culpability

Federal law and practice incentivize businesses to be proactive in preventing, detecting, and rooting out criminal activity. Many of these incentives are codified within the United States Sentencing Guidelines. The Guidelines provide uniform policies and procedures for sentencing individuals and organizations convicted of federal offenses. Created by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act of 1984, the Guidelines were originally mandatory but are currently merely advisory for federal judges. The United States Supreme Court ruled that mandatory guidelines violate the Sixth Amendment right to trial by jury.[30] However, the advisory Guidelines are still quite influential in determining punishments handed out in federal court.

In determining an organization's culpability level, the Guidelines consider whether a corporation or other entity has an effective compliance and ethics program that is "generally effective in preventing and detecting criminal conduct."[31] This is part of a due diligence analysis that also encompasses whether there is "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[32] In addition to due diligence and a demonstrated commitment to doing the right thing, companies are expected to report unlawful conduct to government authorities in a timely manner and to cooperate with criminal investigations. With respect to timeliness, an organization is permitted the reasonable time to conduct its own internal investigation without increasing their culpability score.[33] Attorneys conducting internal investigations should clarify the identity of their client—the business or the individual—among many other procedural safeguards. When companies offer to hire attorneys for their employees, they should only do so with great care, recognizing that this might be viewed as uncooperative or obstructionist by authorities.

The U.S. Department of Justice (DOJ) has published its own guidelines to federal prosecutors for when and how businesses should be prosecuted criminally. These are available on the internet and published in the U.S. Attorney's Manual under the heading *Principles*

*of Federal Prosecution of Business Organizations*.[34] Although public, the guidelines contain the following qualification:

> These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Be that as it may, published DOJ principles can be utilized to persuade prosecutors (and their supervisors both locally and in Washington, D.C.) not to charge organizations because of equities addressed therein. Moreover, federal judges will be very interested to know whether DOJ is adhering to its own guidelines in singling out a business for prosecution. While judges cannot dismiss cases in response to citations to the principles, they can make life very difficult for Assistant U.S. Attorneys and impose more lenient penalties in response to prosecutions falling outside the mainstream of federal practice.

Among the factors to be considered by federal prosecutors in determining whether to charge a corporate target are:

a. The nature and seriousness of the offense;
b. The pervasiveness of wrongdoing within the corporation including whether management was complicit;
c. The corporation's history of similar misconduct;
d. The corporation's willingness to cooperate;
e. The adequacy and effectiveness of the corporation's compliance program if any;
f. The corporation's timely and voluntary disclosure of criminal violations;
g. The corporation's remedial actions including compliance programs, termination of employees including managers, and restitution;
h. Harm to shareholders, pension holders, employees and others not culpable in the crime;
i. The adequacy of non-criminal remedies such as civil lawsuits or regulatory enforcement actions; and
j. The adequacy of prosecuting individuals responsible for corporate malfeasance.

*Principles of Federal Prosecution of Business Organizations,* USAM 9-28.300. While much can be said concerning each of these factors, one of the more controversial considerations in recent years is whether a business must waive its attorney-client and work-product privileges and protections in order to be considered sufficiently "cooperative." The official answer is no: "while a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so."[35] However, there is a fear within the business community that there is an unstated expectation to waive privilege. This fear is not unfounded. A previous version of the sentencing guidelines required a corporation's waiver of the attorney-client and work-product privileges as a prerequisite for obtaining a reduction in the company's culpability score, and DOJ's official and unofficial charging policies reflected that position for many years.

Running afoul of the United States government can have devastating consequences for an organization. One needs look no farther than Detroit federal court to find two recent examples. On February 27, 2017, Takata Corporation waived grand jury indictment and pleaded guilty to a one-count information charging wire fraud in connection with Takata's manufacture of vehicle airbags. The sentence included $975 million in restitution, a $25 million fine, mandated internal controls, and an independent compliance monitor for three years. The company also was subject to the ignominy of having the United States Attorney state publicly that Takata valued profits over the lives of soccer moms like her.[36] Two weeks later, on March 10, 2017, Volkswagen AG pleaded guilty to conspiracy to commit wire fraud and to violate the Clean Air Act, obstruction of justice, and importation of merchandise by means of false statements, agreeing to pay $2.8 billion dollars for selling diesel vehicles with software designed to defeat emissions tests. Sometimes the organization no longer exists after the federal government has completed its targeting—as in the case of Arthur Andersen—even when the Supreme Court exonerates the company by unanimous vote.[37]

When companies offer to hire attorneys for their employees, they should only do so with great care, recognizing that this might be viewed as uncooperative or obstructionist by authorities.

## Conclusion

In conclusion, for the protection of themselves and their organizations, business leaders must take responsibility to proactively prevent, detect, and address unlawful and unethical behavior in their midst.

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**NOTES**

1. *See Frazier v Cupp,* 394 US 731, 737-39 (1969); *Hall v Beckstrom,* 563 Fed Appx 338, 351 (6th Cir 2014).

2. *See United States v Bashaw,* 982 F2d 168, 170-71 (6th Cir 1992)(reversing conviction of defendant who stared at jurors in an intimidating way and referred to them using profanity after they convicted his brother).

3. Fed R Crim P 6(f); Fed R Crim P 7(a); US Const amend V.

4. Fed R Crim P 6(e).

5. *E.g., United States v Forman*, 71 F3d 1214 (6th Cir 1995)(Forman I)(reversing conviction for contempt because DOJ trial attorney, who was acquitted of obstruction of justice, was not assigned to the matter he disclosed to organized crime associates); *United States v Forman,* 180 F3d 766 (6th Cir 1999)(Forman II)(affirming district court's order finding that theft of government property charge for disclosing grand jury material did not constitute double jeopardy); *United States v Brenson,* 104 F3d 1267 (11th Cir 1997)(affirming grand juror's obstruction of justice conviction for disclosing grand jury information to target of investigation).

6. *United States v Morton Salt Co.,* 338 US 632, 642-43 (1950) (grand juries "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.").

7. Fed R Crim P 17(c)(1).

8. *United States v R. Enterprises, Inc.,* 498 US 292, 299 (1991).

9. *United States v Calandra,* 414 US 338, 346 (1974); *see, e.g., In re Grand Jury Investigation (Detroit Police Department Special Cash Fund),* 922 F2d 1266 (6th Cir 1991)(target of grand jury unsuccessfully sought to assert the informer's privilege to thwart inquiry into his own possible corruption).

10. *United States v Damiano,* 579 F2d 1001, 1003 (6th Cir 1978).

11. *In re Grand Jury Investigation,* 922 F2d at 1272.

12. *Id.*

13. *Braswell v United States,* 487 US 99, 102 (1988); *In re Grand Jury Proceedings,* 771 F2d 143, 148 (6th Cir 1985) (en banc) (subpoena requiring production of partnership or corporate records did not violate custodian's 5th Amendment privilege against compulsory self-incrimination).

14. *Braswell,* 487 US at 110.

15. *Id.*

16. *Id.* at 118.

17. *In re: Grand Jury Subpoena,* 912 F3d 623, 632-33 (DC Cir 2019); *FG Hemisphere Associates, LLC v Democratic Republic of Congo,* 637 F3d 373, 376-77 (DC Cir 2011) (describing penalty of $5,000 per week, doubling every four weeks until reaching a maximum of $80,000 per week). Of course, enforcement of such sanctions is a separate issue. *In re: Grand Jury Subpoena,* 912 F3d at 633.

18. Common privileges and protections potentially applicable to businesses include attorney-client, attorney work-product, trade secrets, and corporate "self-critical analysis" privileges. *See, e.g., Dowling v American Hawaii Cruises, Inc,* 971 F2d 423, (9th Cir 1992)(no "self-critical analysis" privilege applies to routine internal corporate reviews related to safety); *In re Kaiser Aluminum and Chemical Co,* 214 F3d 586, 593 (5th Cir 2000)(no self-evaluation privilege where documents in question are sought by a government agency).

19. Fed R Crim P 17(c)(2).

20. 12 USC 3409(a)(authorizing ex parte order delaying notice to customer by financial institution disclosing that records have been obtained or a request for records has been made).

21. 12 USC 3420(b)(automatic statutory gag forbidding financial institutions and their employees from disclosing grand jury subpoena to target if subject matter of investigation involves a crime against a financial institution, a controlled substance offense, money laundering, currency transaction reporting, importing and exporting monetary instruments, or structuring financial transactions).

22. 18 USC 1510(b)(1)(making it a five year felony to disclose federal subpoena for records "with intent to obstruct" a judicial proceeding).

23. 18 USC 1510(b)(2)(making it a one year misdemeanor to disclose federal subpoena to customer or person whose records are sought by subpoena regardless of specific intent).

24. 18 USC 1510(d)(1)(making it a five year felony for those engaged in the business of insurance affecting interstate commerce to disclose federal grand jury subpoena for records "with intent to obstruct" a judicial proceeding).

25. 18 USC 2705.

26. *Eg United States v Cardoza,* 713 F3d 656, 660 (DC Cir 2013)("probable cause does not require certainty, or proof beyond a reasonable doubt, or proof by a preponderance of evidence").

27. *Illinois v. Gates,* 462 US 213, 238 (1983) *quoted in United States v. Padro,* 52 F3d 120, 122-23 (6th Cir 1995).

28. Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 Iowa L Rev 551, 569-70 (1984).

29. In one survey of federal judges about the meaning of probable cause, answers ranged from a 10% to a 90% probability that evidence would be recovered in a search, with most responses falling between 30% and 60%. Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts,* 129 Harv L Rev 2050, 2070 at n89 (citing CMA McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?,* 35 Vand L Rev 1293, 1327 (1982)).

30. *United States v Booker,* 543 US 220 (2005).

31. U. S. Sentencing Guideline 8B2.1(a); 8C2.5(f)(1). This is a term of art which does not require a foolproof compliance and ethics program, but does contemplate that (1) it will be governed by established standards and procedures; (2) the standards and procedures will be communicated to company personnel through periodic training; (3) high level personnel

will be responsible for the overall management of the program; (4) a confidential whistleblower mechanism will be in place whereby unlawful or unethical behavior may be reported; (5) incentives are offered for following the compliance and ethics standards; and (6) the program will be consistently enforced throughout the organization through disciplinary measures for violating the standards. *See generally* section 8b2.1.

32. U. S. Sentencing Guideline 8B2.1(a)(2).

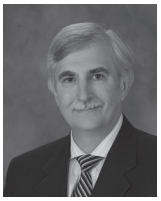
33. U. S. Sentencing Guideline 8C2.5, Application Note 10.

34. USAM 9-28.010-9.28.1500.

35. *Principles of Federal Prosecution of Business Organizations,* USAM 9-28.710.

36. *Takata to Plead Guilty,* Reuters (January 13, 2017).

37. Wojdacz, Innocent after Proven Guilty: Supreme Court throws out Arthur Andersen conviction, www.legalzoom.com (May 31, 2005) ("But for some 28,000 Arthur Andersen employees who lost their jobs, the effort to repair the damage rings hollow. And for corporations that may come under federal scrutiny in the future, the Supreme Court ruling provides little comfort that justice will be served.").



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